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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1120

MARVEL SPECIALTY COMPANY, INC., *Petitioner,*

v.

BELL HOSIERY MILLS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals explaining the judgment of which review is sought is reported at 155 U.S.P.Q. 545,* and is reprinted in the Appendix at p. 1a, *infra.*

The opinion of the District Court for the Western District of North Carolina is reported at 152 U.S.P.Q. 313* and is reprinted in the Appendix at page 11a, *infra.*

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* Not reported in the federal reporter system.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on October 17, 1967.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

An Order of this Court dated January 8, 1968 extended the petitioner's time for filing this petition for writ of certiorari to and including February 14, 1968.

THE QUESTIONS PRESENTED

Petitioner's patent was adjudged to have been infringed by respondent[1] and the District Court ordered an accounting before a master to determine the damages authorized by 35 U.S.C.A. § 284 as interpreted by Part IV of this Court's opinion in *Aro Manufacturing Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964). (Appendix, p. 33a, *infra*) The petitioner sought to take testimony from an officer of the respondent who had knowledge concerning the increased production and other savings made possible by the patented machine in order to establish what constituted a reasonable royalty for the infringing use. The District Court forbade this inquiry on the grounds that Part IV of this Court's opinion in the *Aro* case held that an infringer's profits could not be used as a measure of a patentee's damage and therefore in the ordinary case neither could any inquiry be made into the infringer's savings or profits in connection with determining a reasonable royalty. (Appendix, pp. 29a-30a, *infra*) The Circuit Court affirmed this ruling (Appendix, p. 9a, *infra*) and also ruled that since the evidence showed

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[1] *Marvel Specialty Company* v. *Bell Hosiery Mills*, 330 F. 2d 164 (1964).

an established royalty no inquiry whatever need be made concerning a reasonable royalty for use made of the invention by the infringer (Appendix, p. 9a, *infra*).

The questions presented are:

A. As To Certiorari Policy

Should not this Court resolve the conflicting views of lower federal courts as to whether this Court's opinion in the *Aro* case is in fact a precedent which is to be followed by them in interpreting the patent damage statute 35 U.S.C. 284 in view of the fact that it was an advisory opinion[2] concurred in by only four Justices?[3]

B. As To the Merits

1. Did the Court of Appeals err in holding that once it determined the petitioner's established royalty to be the best measure of petitioner's damage it then became unnecessary to make any inquiry concerning reasonable royalty, even though the patent statutes require that the damages awarded to the petitioner should be in no event less than a reasonable royalty for the use made of the invention by the infringer?[4]

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[2] 377 U.S. 476 at 502.

[3] Footnote 18, 377 U.S. at 502.

[4] The Court of Appeals holding on this point is in direct conflict with the holding of *Hartford National Bank and Trust Company* v. *E. F. Drew and Co.*, 188 F.S. 353 (D., 1960), aff'd by the Court of Appeals Third Circuit, 290 F. 2d 589 (1961).

> "'Moreover, any recovery based on established royalties is rejected. The statute itself (§ 284) provides for nothing 'less than a reasonable royalty for the use made on the invention by the infringer * * *'" (188 F.S. at 362).

2. Assuming that Part IV of this Court's opinion in the *Aro* case is a binding precedent did the Court of Appeals err in holding that the *Aro* case forbids inquiry into the savings which an invention achieves for the infringer and others in determining a reasonable royalty for its use by the infringer?

STATUTE INVOLVED

This case involves 35 U.S.C. § 284 which provides:

> *Damages*
>
> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.
>
> When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.
>
> The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances. July 19, 1952, c. 950, § 1, 66 Stat. 813.

CONCISE STATEMENT OF THE CASE

Petitioner is a Kentucky corporation which supplies equipment used by hosiery and sweater mills. In 1949 it filed a patent application for a mechanical hosiery mender which issued on October 9, 1951 as Patent No. 2,570,637, the patent in suit.

The courts below found that the invention was an immediate success which transformed the mending of pulled threads in sheer hosiery from a slow hand opera-

tion to a mass production type machine operation; that it reduced the cost of such mending from 70 cents to 25 cents per dozen pairs of hose; that it also increased the earnings of the mending worker and made practical the mending of defects which could not be economically repaired by hand; and that three and one-half months after the new device was offered to the trade every major hosiery mill in the United States had taken a lease. (Appendix, p. 50a, *infra.*) The court found that the patented apparatus was so easily copied that petitioner charged only a minimum rental of six dollars per month for the device to discourage infringement. (Appendix, p. 16a, *infra*) This monthly rental is about one-eightieth (1/80) of the monthly savings made by users of the machine. (Appendix, p. 28a, *infra.*).

The district judge appointed a master to determine the damages authorized by 35 U.S.C.A. § 284 as interpreted by this Court in the *Aro* case. (Appendix, pp. 32a-35a, *infra.*) From the beginning of the accounting proceedings the petitioner sought unsuccessfully (1) to take evidence to determine what savings (reduced costs per unit of production) the infringing respondent had made by reason of its use of the patented invention, and (2) to obtain a determination of what constituted a reasonable royalty for the infringing use by the respondent. In a supplemental order to the master (Appendix, pp. 27a-31a, *infra*) the district judge again relying on Part IV of this Court's opinion in the *Aro* case directed that the master should not permit the petitioner to make any inquiry, directly or indirectly to savings or profits gained by Bell as an infringer even in connection with determining a reasonable royalty. (Appendix, p. 30a, *infra*) Thereafter, the master determined that the petitioner was

deprived of $9.00 per month for each infringing machine which the respondent had purchased from a third party. The master also found that the petitioner's net profit during the period of infringement was 33.6% of its gross rental income and therefore its damage by reason of the infringement was this same percentage of the $9.00 per month rental (i.e. $3.02 per month per machine). (Appendix, p. 21a, *infra*) The master also found that this amount ($3.02) was not less than the petitioner's established rentals of $6.00 per month (for the patented machine alone) or $9.00 per month (for the patented machine with an extra attachment)!!! (Appendix, p. 22a, *infra*).

The District Court adopted the master's report with a single relevant exception. The District Court pointed out that the calculation of damages should have been based on the established $6.00 per month rental of the patented machine alone, rather than upon the $9.00 per month rental for the patented machine with an extra attachment, thus reducing the petitioner's damage to $2.01 per month per infringing machine. The District Court made no comment whatever on what constituted a reasonable royalty but did comment on the anomaly of an infringer being allowed to pay $2.00 per month in lieu of the established fee of $6.00 paid by licensees. The court said that this strange result "merely illustrates the difficulty of applying the theories of *Aro* 84 S.Ct. 1526, to the facts of a given case." (Appendix, p. 12a, *infra.*)

The Court of Appeals vacated the award at the two dollar ($2.00) rate saying:

> "It is true that in *Aro* there is contained the language which led the district judge to conclude that plaintiff could recover only that portion of its

established royalty which constituted profit to it. But a reading of the full opinion satisfies us that this language, when viewed in context, including the facts under which the case arose, was employed to make crystal-clear that profits of the infringer were no longer an element of the patentee's damages for infringement and not to alter long-established rules which permit a patentee to recover a gross established royalty as the 'best' measure of actual damages." (Appendix, p. 8a, *infra.*)

The Court of Appeals affirmed the district judge's ruling that an inquiry into savings of the infringer should not be permitted even in connection with determining a reasonable royalty. (Appendix, p. 9a, *infra.*)

The Court of Appeals then went further and completely washed out any need for a determination of reasonable royalty by holding that the record in this case showed an established royalty, and inquiry concerning a reasonable royalty need not be undertaken at all.

"Prior to the trial of the damage question, plaintiff sought to take the deposition of Bell's president for purposes of discovery. Bell moved, *inter alia,* to limit the scope of inquiry so as to exclude discovery of profits gained by Bell or pecuniary advantage to Bell from use of the infringing machines. The district judge granted this portion of Bell's motion.

"In this action there was no error. In the usual case an infringer's profits are no longer an element of a patentee's damages as we have previously shown. Nor could the information sought have relevance to a reasonable royalty. There was in this case an established royalty, and inquiry should not have extended beyond it." (Appendix, p. 9a, *infra*)

FEDERAL JURISDICTION OF THE COURT OF FIRST INSTANCE

The United States District Court for the Western District of North Carolina is the court of first instance in this case and its jurisdiction is based on 35 U.S.C. 281 and 283.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. As To Certiorari Policy

In *England* v. *Deere and Company*, 236 F. Supp. 356 (S.D. Ill., 1964), the District Court points out that Part IV of this Court's opinion in the *Aro* case was subscribed to by only a minority of the Justices and it was not, therefore, a precedent for altering a master's order that a defendant account for profits resulting from patent infringement. The Illinois District Court recognized that the order was in direct conflict with Part IV of this Court's opinion in the *Aro* case which states that under 35 U.S.C. § 284 defendant's profits are no longer a measure of plaintiff's damage. The District Court in the *England* case believed, however, that the certiorari history of *Popiel Bros., Inc.* v. *Zysset,* 318 F.2d 701 (C.C.A. 7th, 1963)[5] indicated that this Court itself did not regard Part IV of its opinion as a precedent which lower courts were bound to follow. In the present case, however, the District Court relied upon the *Aro* opinion solely to support its novel ruling that petitioner is forbidden to make inquiry about the savings respondent made by use of the invention in determining a reasonable royalty. The

[5] This Court denied certiorari on February 17, 1964, *Popiel* v. *Zysset,* 376 U.S. 913, and denied a petition for rehearing on March 23, 1964, 376 U.S. 959.

Court of Appeals affirmed, but also pointed out that Part IV of the *Aro* opinion was subscribed to by only four Justices (Appendix, p. 7a, *infra*), thus indicating that it, too, harbored some doubt about its value as a precedent.

Furthermore, the various federal courts which have regarded the *Aro* opinion as a precedent have ascribed meanings to it which are widely divergent. The Court of Appeals in this case held that *Aro* forbids in the usual case an inquiry into savings or profits in connection with ascertaining reasonable royalty. On the other hand, *Locklin et al.* v. *Switzer Bros., Inc.*, 235 F. Supp. 904 (N.D. Cal. 1964) holds, in a case having no unusual aspects of any kind, that under *Aro* the infringer's profits may have evidentiary bearing on reasonable royalty (at page 906). *Georgia-Pacific Corp.* v. *U.S. Plywood Corp.*, 243 F. Supp. 500 (S.D. N.Y. 1965)[6] also holds that under *Aro* profits, as such, are no longer a measure of the plaintiff's damages (at 537), but that such profits may be considered in determining reasonable royalty (at pages 529-30).

Two recent cases seem to have completely ignored the rule stated in Part IV of this Court's opinion in the *Aro* case. In *Bartlett* v. *Winton*, 237 F. Supp. 631 (D. Fla. 1966) the court awarded infringer's profits as a measure of the patentee's damages. In the case of *Koehring Co.* v. *National Automatic Tool Co.*, 257 F. Supp. 282 (S.D. Ind. 1966) the court also permitted the determination of damages by reference to profits made from the sale of infringing machines.

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[6] This scholarly opinion is encyclopedic in scope and was characterized by the Court of Appeals below in footnote 2 thereof as an "exhaustive and persuasive opinion".

The petitioner's case presents an opportunity for this Court to put in order the diverse views and uncertainties which now prevail concerning the statute governing damages in patent infringement actions. This statute is one which the lower federal courts are required to apply day in and day out and the importance of an authoritative interpretation is self-evident.

B. On the Merits

1. The Court of Appeals held that the evidence in this action showed an "established royalty" and therefore what constituted a reasonable royalty need not be considered. The statute provides, however, that damages awarded to the petitioner should *in no event* be less than a reasonable royalty. The statute clearly requires in every case a comparison of damages, however determined, and reasonable royalty. Obviously the comparison cannot be made if reasonable royalty is not determined. Nevertheless the Court of Appeals held that inquiry into reasonable royalty is unnecessary. How the Court of Appeals arrived at this construction of the brief and clear language of the statute is not easy to understand.

A possible explanation of the Court of Appeals' refusal to permit inquiry into reasonable royalty upon finding that an established royalty exists is that it felt compelled to this conclusion by this Court's decision in *Clark* v. *Wooster,* 119 U.S. 322, 326 (1886). The Court of Appeals referred to this case as authority for the rule that where there is an established royalty it is the "best" measure of damages (Appendix, p. 6a, *infra*). Having found the "best" measure of damages the Court may have felt that any further inquiry would be superfluous. If so, the Court was overlooking the

fact that the rule of *Clark* v. *Wooster* which it applied was developed with reference to a damage statute which required the determination of damages or profits only.[7] The present statute requires for its application a determination of both damages and reasonable royalty. In this case the Court should have proceeded after finding the "best" measure of damages to then determine the "best" measure of reasonable royalty so that it could make the comparison presently required by the statute. The present statute certainly contemplates that the claimant in all events shall have no less than a reasonable royalty, even though this may be an amount different from and in excess of damages, whatever they may be or however they may be measured. It has been generally recognized[8] that the reasonable royalty provision of the statute is for the purpose of establishing a floor under the recovery. This implies that in some instances the reasonable royalty will exceed damages. It can be presumed that damages will always be determined in the "best" possible way, but

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[7] Section 55 of the Consolidated Patent Act of 1870, 16 Stat. 198. See Revised Statutes, Section 629 Subsection 9 and Section 4921.

> "* * * and upon a decree being rendered in any such case for an infringement the claimant [complainant] shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case;"

[8] *Hartford Nat'l Bank & Trust Co.* v. *E. F. Drew & Co.*, 188 F. Supp. 353, aff'd 290 F. 2d 589 (1961) at pages 362 and 363; *Zysset* v. *Popeil Bros. Inc.*, 318 F. 2d 701, 706; and *Locklin* v. *Switzer, Brothers, Inc.*, 235 F. Supp. 904, at 906, characterizing reasonable royalty as "such minimal compensation".

this does not alter the effect to be given to the reasonable royalty provision of the statute.

In *Hartford National Bank and Trust Co.* v. *E. F. Drew & Co.*, 188 F. Supp. 355, aff'd 290 F. 2d 589 (C.C.A. 3rd, 1961), cert. den. 368 U.S. 825 (1961) a master's award based on an established royalty was held to be in error since it was less than a reasonable royalty and therefore an award which did not comply with the statute.[9] This case is an example of a straightforward application of the patent damage statute in an instance where an established royalty existed. Established royalty was determined to measure damages. Reasonable royalty was also determined and the two then compared as required by the language of the statute. It seems evident there is nothing in the language of the statute which justifies the ruling of the Court of Appeals in this action to the effect that the procedure followed in the *Hartford* case was wrong since damages had been determined by reference to an established royalty. Neither is there anything in the history of the statute which would justify an interpre-

[9] At 188 F. Supp. 362-3 the Court stated:

"The award by the Master of merely $28,307.47 [i.e. established royalty] is obviously 'less than a reasonable royalty' and could be said to violate the statutory minimum.

"• • • Moreover, any recovery based on established royalties is rejected. The statute itself (§ 284) provides for nothing 'less than a reasonable royalty for the use made on the invention by the infringer, together with interest and costs' and the 'court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.' • • • A reasonable royalty, taking all other factors and defendant's profits into consideration, would be $358,082. *Anything less than this minimum would be a violation of the statute for recovery.* Such damages are awarded." [Emphasis added.]

tation which so completely ignores the reasonable royalty provision.

This Court considered the legislative history of 35 U.S.C. § 284 in the *Aro* case and found that the purpose of changing the language of the statute to its present form was to:

> "make the basis of recovery in patent infringement suits general damages, that is, any damages the complainant can prove, not less than a reasonable royalty, together with interest from the time infringement occurred, rather than profits and damages." (377 U.S. at 505-6)

The legislative history of the statute is altogether devoid of any suggestion that the award for infringement may be less than a reasonable royalty in the event that damages are measured in the first instance by reference to an established royalty. It may be said with emphasis that the legislative intent was that in no case whatever should the award be less than a reasonable royalty and the record in this case clearly shows that a reasonable royalty would exceed the established royalty of $6.00 per month per machine which was awarded by the Court of Appeals.

This Court long ago established that the criteria for determining a reasonable royalty included consideration of "the nature of the invention, its utility and advantages and the extent of use involved." *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U.S. 641, 35 S.Ct. 221 (1915).[10] The *Hartford* case, *supra*, page

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[10] As a matter of fact this Court invented the concept of reasonable royalty in order to provide some relief to a patent owner who could not prove either damage or profits, the only relief allowed under Section 55 of the Patent Act of 1870 (see footnote 7, *supra*). This development is explained in some detail in *Georgia-Pacific Corp.* v. *The U. S. Plywood Corp.*, 243 F. Supp. 500 beginning at 516.

12, illustrates that there are often practical reasons which enter into the patent owner's determination of a royalty charged which are not among the factors considered in determining the notional reasonable royalty. In this case the court below approved the master's finding that the established royalty of $6.00 per month was initially set at this minimum value for the purpose of discouraging infringement of the relatively simple machine. This is not one of the factors which is considered in determining reasonable royalty. On the contrary it is the rule that it should not be considered.[11] It is also evident in the record of this case that the very large savings in unit cost of production made possible by the invention were not evaluated in setting the established royalty with the weight they would be given in determining a reasonable royalty in accordance with the rule of this Court. Both these points indicate that a reasonable royalty in this case would be an amount substantially larger than the established royalty awarded, and the petitioner has been seriously preju-

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[11] *Hartford National Bank and Trust Co.* v. *E. F. Drew & Co.*, 188 F. Supp. 353. At page 360 the court stated:

> "One measure of damages in infringement cases is on an established royalty basis which is the royalty paid by others in an industry and which indicates a general acquiescence in the value of the invention. In contrast, if a reasonable royalty base is applied, this represents the amount one would pay for the use of the patent as a business proposition, after evaluating the novelty of the invention, its utility and advantages. Faulkner v. Gibbs, 9 Cir., 199 F. 2d 635. *A reasonable royalty is often higher than an established royalty for the latter is usually based upon agreements, negotiated before the patented invention is broadly recognized and before the patent stands the test of judicial scrutiny.* The lowest return for a measure of damages would be on the basis of an established royalty." [Emphasis petitioner's.]

diced by the Court of Appeals' ruling that reasonable royalty need not be considered because damages have been determined by reference to the established royalty.

2. During the accounting the petitioner was refused leave to take testimony directed to showing the savings (increased production per unit of cost) which the patented machine had achieved for the infringer and others. The District Court held that the *Aro* case eliminated profits as a consideration in the determination of damages and that petitioner could not bring in through the back door a consideration of the infringer's profits or savings in connection with determination of a reasonable royalty, if indeed a determination of reasonable royalty was needed at all. (Appendix, p. 29a, *infra*) The District Court stated that in enacting 35 U.S.C. § 284 Congress intended that no inquiry should be made into an infringer's savings in determining reasonable royalty, particularly where a less burdensome method of determining reasonable royalty was available. The court did not explain what this other method might be nor comment on the fact that its elimination of the productivity of the invention as a factor in determining reasonable royalty emasculated the criteria established by this Court in *Dowagiac* case, *supra*, page 13.[12] (Appendix, pp. 29a-30a, *infra*). The Court of Appeals affirmed.

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[12] The District Court went on to say that infringer's profits might have some probative relevance with respect to reasonable royalty but as explained in *Georgia-Pacific Corp.* v. *U.S. Plywood Corp.* proof of profits could be made only after establishing the foundation fact that a measurable portion of the infringer's sales would have been made by the patent owner and that such proof was lacking in this case. The District Court obviously misread the *Georgia-Pacific* case and the portion of the opinion to which it refers is speaking about calculating "damages" on the basis of

There is simply nothing whatever in the leigslative history of the patent damage statute which supports the contention that Congress intended in framing the 1946 amendment to alter the criteria for determining a reasonable royalty. Neither does it appear that Part IV of this Court's opinion in the *Aro* case justifies such a significant alteration in the prior law. Both before [13] and after [14] the *Aro* case it has been generally understood that savings are a relevant consideration in determining reasonable royalty. The court below seems to be the first to hold otherwise and in doing so leaves open what the applicable rules may now be.

The savings that an invention can achieve must be considered in determining reasonable royalty unless that concept is to become a completely meaningless abstraction. In real life, the inquiries a prospective licensee makes are: how much will the invention save for me; will the Union let me use it; will it require any more floor space; will it require changing other procedures; and will it require retraining personnel? These last three factors are all subsidiary to the inquiry of how much the invention will save. A rule which

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lost sales. The District Court also overlooked the comment in the *Georgia-Pacific* case which is relevant to determination of reasonable royalty. Judge Herlands, at 243 F.S. 529, stated:

> "The size of an infringer's profits is often an influential factor in the determination of the amount of a reasonable royalty."

No qualification of this rule was made.

[13] *Faulkner* v. *Gibbs* (C.C.A. 9—1952), 199 F. 2d 635, 640; *Hartford National Bank & Trust Co.* v. *E. F. Drew & Co.*, 188 F. Supp. 353, 359.

[14] *Georgia-Pacific Corp.* v. *U.S. Plywood Corp.*, 243 F. Supp. 500 at 529; and *Locklin* v. *Switzer Brothers, Inc.*, 235 F. Supp. 904 at 906.

would prohibit inquiry into savings would completely detach the concept of reasonable royalty from the realities of business, and as indicated, the courts which have considered the point have recognized that the *Aro* decision does not require this. Nor should it be required.

There are reasons, each sufficient, for allowing inquiry into savings in connection with determining reasonable royalty, irrespective of the clear intent and desire of Congress to eliminate the infringer's profits as such as a measure of a patent owner's damage. First of all, it is perfectly clear from the legislative history that Congress never intended to make any change in the criteria for determining reasonable royalty in making its 1946 amendment to the patent damage statute. An accounting of profits as such was eliminated because of the burdensome proceeding necessary to determine profits with the accuracy required to observe the rule that neither party should have what rightly belonged to the other.[15] Such an accounting involved the entire business operation of the infringer, and in many instances an apportionment of the profits attributable to the invention. A determination of the savings which the invention is capable of achieving merely requires investigating the one small segment of a business operation in which the invention is actually used. It is of no consequence that the remainder of

[15] "In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants. * * * Of course, the result to be accomplished is a rational separation of the net profits so that neither party may have what rightfully belongs to the other, and it is important that the accounting be so conducted as to secure this result, if it be reasonably possible." *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U.S. 641 (1915).

the operation is operated at a profit or a loss. Furthermore, savings, although the most important, is but one of the factors on which a reasonable royalty is based, and consequently savings need not be determined in connection with reasonable royalty with the same nicety as was required in determining profits *as such* as a basis for an award of damages. This point is explained in *Georgia-Pacific Corp.* v. *U.S. Plywood Corp.*, 243 F. Supp. at 530:

> "Although the profits made by an infringer are frequently taken into account in the fixing of a reasonable royalty, such profits are only one of many elements which are considered and, therefore, such profits need not be assessed with the same degree of exactitude that would be necessary if they were to function as the sole measure, as a matter of law, of the patent owner's monetary recovery. * * *
>
> "Consequently, when the infringer's profits are to be determined in order that they may serve as a factual guide in the setting of a reasonable royalty, there is no need for a protracted and complex accounting."

A more important point is that a reasonable royalty is arrived at by awarding the patent owner only a fair share of the savings made possible by the invention. It has been shown in this case that twenty-five percent (25%) of the savings achieved by the infringer would represent a reasonable royalty. Consequently, if the savings were inexactly determined it would simply mean that the infringer retained somewhat more or somewhat less than seventy-five percent (75%) of the total savings. Consequently, in arriving at a reasonable royalty it is almost beyond possibility that the infringer would be required to pay over to the patent

owner any amount which was not clearly attributable to the infringing use. Thus, the primary reason for requiring a determination of profits with exactitude when they were to serve as a measure of damages is not involved in determining savings for the purpose of arriving at a reasonable royalty.

CONCLUSION

Virtually all aspects of the patent damage statute are in need of clarification and this case presents the Court with an opportunity to explain its true construction.

Respectfully submitted,

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